FRONT Report LINE

January 1999 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 6, No. 1

U.S. SUPREME COURT RULINGS

Employers liable, searches limited

Ignorance not defense in sex harassment cases

TWO U.S. SUPREME COURT rulings expand the responsibility of employers to prevent and end sexual harassment.

Previously, courts have generally allowed employers to escape liability for sexual harassment that creates a "hostile work environment" if they were unaware of the conduct.

However, in *Burlington Industries v. Ellerton*, 118 S.Ct. 2257 (1998) and *Foragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998), the court held that "ignorance" is not a defense. The holdings of the two opinions indicate that a police department:

■ **Can be held liable** because an employee engaged in sexual harassment.

■ **Can avoid liability**, at least in cases where no adverse employment action has been taken against the employee, by proving it took reasonable steps to prevent or stop the harassment **and** by proving it had a formal, internal grievance procedure with remedies the victim did not use.

■ **Will be held liable** for harassment, even if no adverse employment action has been taken, if the department had no concrete policies on harassment.

Harassment policy needed

All agencies, regardless of size, must have a sexual harassment policy and must inform all employees about it. The policy also must be enforced.

The AG's Office provides sexual harassment training throughout the state to law enforcement agencies and local governments.

To request training, contact Andrea Spillars, head of the AG's Public Safety Unit:

573-751-4418

Searches incident to arrest limited to custodial arrests

THE U.S. SUPREME Court unanimously held that the right to make a search incident to arrest exists only when an officer makes a custodial arrest.

In *Knowles v. Iowa*, the top court declared unconstitutional an Iowa law that allowed police officers to search any time they had probable cause to arrest — even when issuing traffic tickets.

Patrick Knowles was stopped and ticketed for driving 43 mph in a 25-mph zone. A search of the car uncovered marijuana and a pot pipe.

The court ruled the statute unconstitutional under the Fourth Amendment. The right to make a search incident to arrest arises from two rationales:

■ The need to determine if a suspect has weapons, and

■ The need to preserve evidence that

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AG's Strike Force at full force

THE AG'S METH PROSECUTION Strike Force is now fully staffed with the addition of three seasoned investigators with support provided by an experienced paralegal and secretary.

Police officers who have meth-related questions can contact Strike Force Director Tim Anderson at 573-751-1508.

Prosecutors who want to refer cases to the AG's Office also should contact Anderson.

Investigators, support staff profiled: Page 2

The Strike Force will be taking at least six meth-related cases to trial in January and February. These are the first cases to be tried by the Strike Force, which was formed in July 1998.

Copies of the 1998 revised Sunshine Law book can be obtained by calling 573-751-3321.

Identity theft now a federal crime

A NEW LAW that took effect Oct. 30 makes it a federal crime for a suspect to steal someone's identity.

The Identity Theft and Assumption Deterrence Act of 1998 (Public Law No. 105-318) makes it a crime for anyone who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, another person with the intent to commit" a felony under state or federal law.

Nationally, thousands of victims have had their identities stolen by thieves who use the identities to run up huge debts or to commit thefts and other serious crimes.

The penalties range up to 20 years' imprisonment under the act, which amends 18 U.S.C. Section 1028 of federal law. In the past, there have been no criminal penalties for stealing an identity.

Missouri has no such statutory prohibition.

AG's meth unit at full force

STRIKE FORCE INVESTIGATORS, SUPPORT STAFF

LEDBETTER

DOWIS

LAW

TAYLOR

PITTS

THE METH PROSECUTION Strike Force is fully staffed with the addition of three seasoned investigators supported by an experienced paralegal and secretary.

■ **Ken Ledbetter** brings 29 1/2 years of experience with the Highway Patrol, where he retired as assistant director of the research and development division.

Ledbetter has spent at least 20 of those years in the detection and eradication of narcotics including uncovering and investigating drug cases as a road trooper and later as a corporal, conducting surveillance as a pilot, and working in the Drug and Crime Control Division for about seven years. He has been trained in clandestine meth lab operations and hazardous waste operation and response training.

■ **Roger Dowis** spent 25 years with the Los Angeles Police Department where he routinely dealt with drug cases. He worked for 10 years as an officer in the narcotics unit, was a sergeant for 12 years and then was promoted to lieutenant. As a supervisor, he routinely oversaw and reviewed narcotics cases that included meth, coke and heroin.

■ **Dick Law** has only been in law enforcement for eight years but those years have been ambitious, capped by his certification as a member of the DEA's Clandestine Laboratory Enforcement Team. In the last four years, he has participated in more than 120 meth lab and meth-related investigations while working as an investigator in the Butler County prosecutor's office.

He also worked as a sheriff's deputy in Butler County and as a narcotics officer in Poplar Bluff.

■ **Ginny Taylor** brings 14 years of paralegal experience to the new unit. Before transferring to the Strike Force, she worked in the AG's Office helping defend the state against inmate lawsuits. Her duties include interviewing witnesses and helping prosecutors prepare cases for trial.

■ Secretary **Toni Pitts** adds 11 years of law enforcement experience — four years with the AG's Office's Criminal Division and seven years as an assistant to the Laclede County prosecutor. She will graduate in May with a degree in criminal justice.

Front Line Report is published on a periodic basis by the Missouri Attorney General's Office, and is distributed to law enforcement officials throughout the state.
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UPDATE: CASE LAW

MISSOURI SUPREME COURT

State v. Robert Burns
No. 80744
Mo.banc, Oct. 20, 1998

The Missouri Supreme Court declared unconstitutional a state law that admits evidence of uncharged misconduct in child sexual offense trials. Section 566.025 permits that certain conduct is admissible to prove propensity.

The court confined its ruling to a violation of the Missouri Constitution — the statute permits admission of the evidence to prove propensity. The court held that Section 566.025 violates Article I, Sections 17 and 18(a) of the Constitution where the evidence is presented while guilt remains undecided.

State v. Christopher W. Gilyard
No. 80269
Mo.banc, Oct. 20, 1998

The court did not abuse its discretion by admitting evidence of an uncharged prior sexual assault under the "signature modus operandi" exception under *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc, 1993).

There were many common aspects between the assault on the charged victim and the uncharged conduct. Both victims were teen-age girls whom the defendant knew; both assaults occurred within the same month in the defendant's home; the defendant wore a condom for both assaults; and the defendant bit both girls on the cheek to compel them to consent to sex.

The victims were not merely bitten during a rape; the record showed a remarkably consistent pattern of sexual assaults that included demanding sex and enforcing those demands through the unusual and distinctive means of biting the victims on the cheek.

Under this exception created by the Missouri Supreme Court in *Bernard*, the evidence of the prior act and the charged crime should be so "unusual and distinctive as to be a signature of the defendant's modus operandi."

WESTERN DISTRICT

State v. Wayne Edward Johnston
No. 54207
Mo. App., W.D., Sept. 29, 1998

The trial court did not err in limiting the questioning of a defense expert about the alleged suggestive nature of interviewing techniques on young sexual-abuse victims. At a motion in limine, the defense's expert opined that interviews with the victims were suggestive and put extraneous information into the youngsters' memory and narrative. The expert-witness called this phenomenon "confabulated memory."

The court ruled the expert opinion testimony about the credibility of witnesses would not be admissible. Direct examination of the expert did not reveal any prejudicial inhibition of the questions to the expert on the suggestibility of circumstances surrounding the taking of statements. The expert was inhibited only on questions pertaining to the expert's opinion on the youngsters' credibility.

State v. Preston White
No. 54686
Mo. App., W.D., Oct. 20, 1998

The defendant's conviction of attempting to manufacture a controlled substance, meth, and possession of pseudoephedrine with the intent to manufacture meth did not constitute double jeopardy.

Since the crime of possession with intent to make meth contains an element not contained in the crime of attempting to make meth, double jeopardy is not implicated.

The possession of pseudoephedrine with the intent to make meth requires the "awareness of the presence and the nature of the substance." This is a separate element not required to be proven to convict for attempting to make meth.

The crime of possession was completed before the defendant attempted to make meth. Once the defendant began to make meth, the mental state required for possession was no longer an element.

State v. Raymond L. Brightwell and Chad Parsons
No. 54578
Mo. App., W.D., Nov. 3, 1998

The court reversed the defendants' conviction of sale and possession of controlled substances. The court found that the state did not prove the type of substances sold to an undercover officer or seized during a search by police.

The state did not prove that the substances, identified by a highway patrol chemist to be cocaine, marijuana, psilocyn and LSD, were the same substances purchased or seized.

The state presented the test results through written reports prepared by the chemist, who did not testify. Nothing in the reports established that the tested substances were purchased from the defendants. The reports merely referred to sealed plastic bags and the identity of the substances. Nothing explained the significance of the exhibit numbers on the report or whether they established a relation to the substances purchased or seized by police.

EASTERN DISTRICT

UPDATE: CASE LAW

EASTERN DISTRICT

State v. Ray Anthony Price

No. 73706

Mo. App., E.D., Oct. 27, 1998

The court reversed the defendant's conviction of receiving stolen property because there was no evidence showing that anyone other than the defendant stole the property.

The defendant was found pushing a shopping cart of stolen items from an apartment building. When witnesses approached, they saw another item concealed in the defendant's clothing. Tracks in the snow made it obvious that the cart had come from the building.

The defendant was charged with second-degree burglary and in the alternative receiving stolen property. The jury found the defendant guilty of receiving.

In past cases, the court had defined receiving stolen property to be a "two-party transaction." But there was no reference to any other person who could have stolen the items for which the defendant was arrested.

This case is significant in that it may not be automatically assumed that all stealing cases may also be charged as receiving stolen property cases.

SOUTHERN DISTRICT

State v. Kevin Lee Madison

No. 20715

Mo. App., S.D., Oct. 14, 1998

The court reversed the defendant's conviction of three counts of endangering the welfare of a child in the first degree. While the information charged the crime of endangering the welfare of a child in the first degree, it alleged that the defendant acted with criminal negligence and in fact stated the elements of second-degree endangerment. Because the defendant was charged with facts constituting second-degree endangerment, but convicted following an instruction submitting first-degree endangerment, the court reversed and remanded for further proceedings.

State v. Jason C. Silvey

No. 20707

Mo. App., S.D., Oct. 14, 1998

The court affirmed the conviction of two counts of child abuse while the defendant argued that his "paddling" of his children did not constitute cruel and unusual punishment under the statute.

Evidence showed that the defendant swung a wooden paddle like a "ball bat" and struck his stepsons on the buttocks, back and legs numerous times, severely bruising them. While some people believe spanking is an acceptable form of discipline, it would defy the conscience and common sense to conclude that it is not "cruel and inhuman" to beat two children, ages 8 and 10, leaving severe bruises.

The court also rejected the defendant's argument that his conduct did not constitute "punishment" as required under the child abuse statute. The court held that the plain and ordinary meaning of the word "punishment" in Section 568.060 includes "severe, rough, or disastrous treatment."

State v. Duncan T. Smith

No. 21907

Mo. App., S.D., Nov. 5, 1998

The defendant, an attorney, was convicted of possession of a controlled substance. The court did not declare a mistrial after permitting the state to repeatedly ask the defendant to disclose the name of a client or comment on his refusal to disclose the name.

At trial, the defendant testified that he represented several drug dealers and that he had collected money from an alleged drug dealer that day. He opined that the controlled substance could have been on the money, explaining the residue found in an envelope in his pocket and which was the evidence supporting the charge.

Besides the fact that the appellant failed to properly raise this issue before the trial court, the court refused to hold that the attorney-client privilege protected the situation.

Although the defendant testified he had received supposed "dirty" money from a client "alleged to be a drug dealer," he offered no details about his purported professional relationship with the client.

No evidence showed when the alleged attorney-client relationship started or whether it existed when the defendant received the money. There also was no way to determine whether a professional relationship existed.

Although the "privileged communication may be a shield of defense as to crimes already committed, it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society." Likewise, a party may not claim the privilege when communications between a non-lawyer and a lawyer involve non-legal matters.

Without evidence showing why the defendant got the money and the nature of the relationship, the trial court had no basis for deciding whether Rule 4-1.6 or Section 491.060.3 precluded the defendant from disclosing his client's identity.

Elizabeth Ziegler, director of the Missouri Office of Prosecution Services, prepares the Case Law summaries.

8th Circuit upholds search based on mistaken identity

THE 8th CIRCUIT COURT of Appeals recently upheld a search that occurred after police mistakenly arrested a suspect's brother.

Police were looking for Kent Junkman on an outstanding arrest warrant for escape. After police were informed that Junkman was staying at a motel, a motel clerk identified a picture of Junkman as an occupant.

After hearing people in the motel room, police entered and found Junkman's brother, who strongly resembles his brother. While the arrest was unsuccessful, the officers saw a lot of drug paraphernalia and noticed that Junkman appeared to be under the influence of drugs. Based on this information, the police obtained a search warrant and uncovered five bags of meth and $6,000 in a canister.

The legality of the search depended on the legality of the initial entry. Although police had no search warrant when they entered, under the "arrest warrant exception" to the search warrant normally required, police may enter a residence to execute an arrest warrant if:

- They have an arrest warrant for the suspect;
- They search the residence of the suspect; and
- They have probable cause to believe the suspect is at the residence when they search.

Police had probable cause to believe Junkman resided at the motel and that he was inside, although that cause was "not in fact correct."

Note that the legal entry only gave officers probable cause to believe they would find drugs; the drugs were not in "plain view." Thus, the actual search required a search warrant. Had the officers simply begun to search for drugs, the search would have been illegal and the evidence would have been suppressed.

U.S. Supreme Court to review 'civil' seizures

THE U.S. SUPREME COURT has agreed to hear a Florida case to determine whether a police officer can seize an item subject to forfeiture when there is no "probable cause" to believe the item is evidence of a crime.

The Fourth Amendment allows officers to seize evidence if they have probable cause to believe an item is evidence of a crime.

In *Florida v. White*, the Florida Supreme Court ruled that, absent exigent circumstances, officers could seize only evidence for **criminal cases**. The U.S. Supreme Court will decide that issue with a ruling not expected before fall.

This issue often arises in Missouri when an officer makes a routine traffic stop and discovers a large sum of money and a driver who claims no knowledge of the money or its source. Because no drugs are found, the officer has no probable cause to believe a crime has been committed. It is not illegal to carry $1 million in cash.

SEARCH

CONTINUED from Page 1

could be used at trial. The officer need not have probable cause or reasonable suspicion to search. He must have made a lawful custodial arrest and taken the suspect into custody.

The Iowa statute attempted to broaden this authority by including situations in which an arrest is not made. Iowa argued that because the traffic citation requires probable cause before it can be issued, officers should be permitted to search.

The Supreme Court disagreed, holding that this intrusiveness is not justified or reasonable when a citizen receives only a traffic ticket and is permitted to leave. Fears of evidence being destroyed or of the driver being armed do not justify a warrantless search. If the officer has reason to be concerned, then the officer can make a custodial arrest and conduct a full search.

FULL CUSTODIAL ARRESTS NOT RESTRICTED

The U.S. Supreme Court's opinion in no way restricts officers from making a full custodial arrest for any arrestable offense. Section 5422.17, RSMo., allows certified officers to make a custodial arrest for traffic violations, including infractions. Although the *Knowles* decision was widely reported, its impact on Missouri was minimal since the training received by Missouri officers is consistent with the *Knowles* decision.

While some defense attorneys have indicated they plan to use this opinion to challenge searches, officers have no reason to fear defense motions challenging the admission in court of evidence seized. However, officers must conduct searches incident to arrest in a manner consistent with their training.

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Gun makers under assault

Lawsuit accuses firearms industry of negligent marketing

A FEDERAL LAWSUIT seeking to hold gun makers responsible for weapons falling into criminals' hands goes to trial in January.

This case, the first to accuse the firearms industry of negligent marketing, alleges that gun makers knowingly oversupply the legal market.

The class-action liability lawsuit was filed in 1995 by the families of seven shooting victims. They are seeking unspecified damages.

Previous lawsuits have blamed shootings on gun defects or alleged that guns were inherently dangerous. Courts have thrown out the claims of inherent danger, and the defective gun cases have had mixed success.

This case is the first to accuse the firearms industry of negligent marketing. It alleges that gun makers knowingly oversupply the legal market.

In mid-December, a federal judge rejected a request by more than 30 defendants to dismiss the lawsuit.

State permit, check still required for handgun buyers

A FEDERAL GUN-CONTROL LAW does not pre-empt a Missouri law requiring a state permit and background check on buyers of handguns.

The Brady Act made headline news after a provision took effect on Nov. 30 requiring potential buyers of shotguns and rifles to undergo FBI background checks. Previously, only handgun buyers were required to undergo such checks.

Permits are denied for applicants who have criminal records, a history of mental illness, drug addiction or domestic violence, are illegal aliens, fugitives or were dishonorably discharged from the military, or have renounced their citizenship.

While Missouri buyers must adhere to the federal provisions, **handgun** buyers also still must apply for a state permit through their county sheriff's department. The background checks are run through MULES and the National Crime Information Center.